Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

Matthew Gensburg, et al., *Petitioners*

v.

Fred Miller, et al., *Respondents.*

On Petition for a Writ of Certiorari to the
California Court of Appeal
First Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The court below upheld the granting of demurrers to petitioners' civil rights claims under 42 U.S.C. Section 1983 on the basis that all defendants were entitled to absolute immunity. The questions presented are:

1. Whether county social workers, who lack any prosecutorial authority, should be denied absolute immunity for their conduct in obtaining investigative information and persuading state prosecutors to institute and then expand a proceeding to revoke a foster care license.

2. Whether a state prosecutor should be denied absolute immunity for his own investigative conduct in seeking evidence of unrelated new charges to add to a pending proceeding to revoke a foster care license.

3. Whether state prosecutors should be denied absolute immunity for their unilateral administrative action in suspending a foster care license pending hearing on licensing revocation charges in order to protect foster children from a substantial threat of harm.

4. Whether county social workers and a state prosecutor should be denied absolute immunity for making defamatory statements about foster care licensees outside the ambit of a proceeding to revoke the license thereof.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

MATTHEW GENSBURG, et. al., *Petitioners*[1]

v.

FRED MILLER, et. al., *Respondents*[2]

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FIRST APPELLATE DISTRICT

Petitioners Matthew Gensburg, et. al. respectfully petition for a writ of certiorari to review the judgment of the California Court of Appeal, First Appellate District in this case.

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[1] All petitioners are: Matthew Gensburg and Pamela Gensburg, both individually and as guardians ad litem for Stuart Gensburg and Brandi Kolstad; and Nancy Curry, both individually and as guardian ad litem for Gregory Evans and Charmaine Evans.

[2] All respondents are: Fred Miller, Steven A. Shaffer, Stuart R. Oppenheim, Pat Crawford, Marjorie Knoop, County of San Mateo.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* C1-C27) is reported at 37 Cal.Rptr. 97. The opinion of the superior court (App., *infra,* B1-B3) is unreported.

JURISDICTION

The California Supreme Court entered its order denying review of the opinion of the court of appeals on March 2, 1995 [App., *infra,* D1]. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATUTORY PROVISION INVOLVED

California Health & Safety Code Section 1550(e) [App., *infra*, E1-E3] provides in relevant part that the State Department of Social Services ("State DSS") "director may temporarily suspend any license or special permit, prior to any hearing when, in the opinion of the director, the action is necessary to protect residents or clients of the facility from physical or mental abuse, abandonment, or any other substantial threat to health or safety."

STATEMENT

A. Proceedings Below

This federal civil rights action arises out of an administrative license revocation proceeding ("license action") commenced in June, 1991 against the foster care license held by petitioners Matthew and Pamela Gensburg ("Gensburgs"), during which their license was suspended and

their foster children forced to leave for approximately five months. The license action concluded by fully reinstating the Gensburgs' license.

Joined by petitioner Nancy Curry, the mother of two foster children who were thus forced to leave, the Gensburgs brought this civil rights action on behalf of themselves and their own children in September, 1992. Respondents Fred Miller and Steven A. Shaffer were the officials of the State DSS who prosecuted the license action and decided to suspend the Gensburgs' license in the course thereof. Respondents Stuart R. Oppenheim, Pat Crawford, and Marjorie Knoop were officials of the San Mateo County Department of Social Services ("County DSS") who provided investigative information to Miller and Shaffer before and during the license action.

The superior court granted demurrers to petitioners' second amended complaint on the ground that all respondents were entitled to absolute immunity. Petitioners appealed from the resulting judgment in its entirety to the court of appeals, and the latter affirmed on the same ground [App., *infra,* C1-C27][3]

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[3] The superior court judgment was filed on October 18, 1993. The decision of the court of appeals was filed on December 12, 1994. Petitioners requested a rehearing of the entire decision, including by pointing out that the court of appeals erred in failing to address the issue of respondents' defamatory statements (petitioners raise this issue in the fourth question presented in the instant petition for consideration by this Court). On January 11, 1995, the court of appeals denied petitioners' request for rehearing, and, over petitioners' opposition, certified said decision for publication. Petitioners then requested the California Supreme Court to depublish said decision, and also petitioned the latter court for review thereof. The California Supreme Court denied said request and petition on March 2, 1995.

B. Material Facts Alleged in Second Amended Complaint

The second amended complaint [App., *infra,* A1-A21] states three claims for federal civil rights violations.

The first claim is against respondents Oppenheim, Crawford, Knoop, and the County of San Mateo ("County defendants"), alleging that from 1988 onward they pursued a malicious vendetta against the Gensburgs directed at driving them out of the foster care business. Themselves possessing no authority to suspend or revoke foster care licenses, the County defendants succeeded in persuading Miller and Shaffer to commence the license action in June, 1991 on the sole basis of a minor altercation in which Matthew Gensburg was involved, although this incident had no connection with the foster care which he and his wife were providing. During the next few months, the County defendants worked at bolstering the license action by inducing persons to manufacture false allegations about the Gensburgs which might lead to additional charges against them. Knowing these allegations to be false, the County defendants funneled them to Miller and Shaffer, and induced them to add thirty further charges in the license action as well as immediately to suspend the Gensburgs' license and remove all their foster children. Both during and after the license action, the County defendants made defamatory statements about the Gensburgs to personnel in the San Francisco Department of Social Services ("SFDSS"), through whom the Gensburgs were then receiving foster children. These statements caused SFDSS to terminate further placements of foster children with the Gensburgs. The Gensburgs were thereby driven out of the foster care business, their license reinstatement proving a phyrric victory.

The second claim is against defendants Miller and Shaffer ("State defendants"). Petitioners therein allege that Shaffer departed from his prosecutorial function by joining personally with the County defendants in seeking out persons who could be induced to manufacture false allegations about the Gensburgs. In pursuing this overzealous and unprofessional investigation, Shaffer eschewed the staff investigators employed and ordinarily utilized by State DSS in conducting its licensing investigations. Together with the County defendants, Shaffer obtained an array of allegations which, despite his knowledge of their falsity, he presented to Miller and induced the latter to supplement the sole original charge in the license action against the Gensburgs by adding thirty further charges on the basis of these allegations. Shaffer further used these allegations to induce Miller to exercise his administrative authority under Health and Safety Code Section 1550(e) to suspend the Gensburg's license without waiting for the pending hearing in the license action. Shaffer and Miller also joined with the County defendants in making defamatory statements about the Gensburgs to SFDSS, thereby contributing to termination of the Gensburgs as foster care providers.

The third claim alleges that the County defendants and the State defendants conspired together to defame and maliciously prosecute the Gensburgs, implementing this conspiracy through the actions described in the preceding claims.

C. Decision Below

After reviewing the decisions by this Court concerning prosecutorial immunity in Imbler v. Pachtman (1976) 424 U.S. 409 ("Imbler"), Burns v. Reed (1991) 500 U.S. 478 ("Burns"), and Buckley v. Fitzsimmons (1993) ___ U.S. ___, 125 L.Ed.2d 209 ("Buckley") [App., *infra*, C9-

C12], the court of appeals enunciated a broad proposition that "*Imbler*-type immunity has been extended by most federal courts to social workers performing their statutorily-authorized functions" [App., *infra*, C12].

The court then addressed petitioners' argument that, in suspending the foster care license, the State defendants "were not acting as advocates, but rather performing an administrative function ancillary to the license revocation proceedings" [App., *infra,* C15-C16]. The court responded that this argument proved too much in that, if not then functioning as prosecutors, the State defendants remained entitled to quasi-judicial immunity in that "[s]tate officials making a decision whether to invoke suspension remedies pursuant to statute are acting in a quasi-judicial capacity" [App., *infra,* C16].

Turning to the investigative conduct of Shaffer, the court emphasized that Buckley, while delineating prosecutorial immunity "more finely" [App., *infra,* C11], reiterated that "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity" [App., *infra,* C18]. The court applied the doctrine of prosecutorial immunity to the facts concerning Shaffer's investigative activity by stating that "Shaffer's conduct in interviewing witnesses and evaluating reports and complaints in preparation for filing an accusation, falls within the scope of the prosecutorial role" [App., *infra,* C19-C20].

As to the County defendants, the court addressed petitioners' argument that they "cannot partake of prosecutorial immunity because they had no power to institute or prosecute license revocation proceedings" [App., *infra,* C21]. The court responded that, nonetheless, in terms

of the focus of the Imbler test on "the function they are performing while engaged in the alleged misconduct", "the County defendants were operating in a role functionally equivalent to that of the prosecutors whom they served [App., *infra,* C21]. Emphasizing the duties of the County defendants to investigate and report on any complaints about licensed foster homes to State DSS for possible licensing action, the court perceived this case to be "closely analogous" to McMartin v. Children's Institute International (1989) 212 Cal.App.3d 1393, in which a private investigative service (CII) hired by local government officials to investigate allegations of child abuse at a preschool and report its findings was deemed to be engaged in a quasi-prosecutorial function. The court concluded that "[t]he same immunity which protects prosecutors and social workers investigating child abuse should apply to County defendants when performing their duties to monitor and report on the activities of foster licensees to state prosecutorial officials" [App., *infra,* C23].

REASONS FOR GRANTING THE PETITION

A. The Decision Below Conflicts with the Decisions of this Court and of the Circuit Courts of Appeal

As to the State defendants' suspension of the Gensburgs' license and the resulting disruptive removal of all foster children from their home, the court below largely conceded, as it must, that this action could not qualify as prosecutorial. The State defendants' suspension authority was limited by Health and Safety Code Section 1550(e) ("Section 1550(e)") to protecting the foster children from substantial danger [App., *infra*, E2], and did not extend to

preparing or advancing the pending case for revocation. Imbler, 424 U.S. at 430-431 [advocacy as touchstone for ambit of prosecutorial immunity]. See: Robison v. Via (2nd Cir. 1987) 821 F.2d 913 [official action to prevent harm to another as protected only by qualified immunity at common law].

Nor, as the court below suggests instead, is it tenable to deem the license suspension an instance of "quasi-judicial" action. Two decisions cited by the court below in that connection, Butz v. Economou (1978) 438 U.S. 478, 511-512, and Chalkboard, Inc. v. Brandt (9th Cir. 1989) 902 F.2d 1375, 1379 are at odds with this inapt characterization. Butz emphasizes, inter alia, that the decisionmaker be neutral and independent, whereas herein Miller, as the decisionmaker both in instituting the suspension and in determining pursuant to Section 1550(e) whether to continue the suspension after hearing, heads the prosecution team. Compare: Cleavinger v. Saxner (1985) 474 U.S. 193 [prison disciplinary committee not sufficiently impartial or independent to be accorded quasi-judicial immunity]. While Chalkboard turns on the absence of statutory authority for the suspension therein involved, the court deemed it unnecessary to reach the question of whether the authority--if it existed--might qualify as judicial or prosecutorial, if either one[4].

As to the overzealous exploratory investigation

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[4] In this connection, the court distinguishes two decisions, Horwitz v. Bd. of Medical Examiners (10 Cir.) 822 F.2d 1508, and Austin Municipal Securities v. Nat'l Ass'n of Securities Dealers (5th Cir. 1985) 757 F.2d 676, in which the regulatory entities exercised their statutory authority in sufficiently adjudicatory contexts, with appropriate safeguards, to come within the precepts laid down in Butz for quasi-judicial immunity.

conducted by Shaffer, the court below squarely undermines the Buckley decision by characterizing this conduct as prosecutorial. Buckley teaches that a prosecutor is entitled to only qualified immunity when carrying out "a detective's role in searching for the clues and corroboration that might give him probable cause," Id. 125 L.Ed.2d at 226. This brlght-line test of probable cause, for investigative activity which is or is not prosecutorial, should apply to administrative prosecutors no less than to criminal prosecutors. Butz.

In according prosecutorial immunity to the County defendants, the court below leapfrogs past the dearth of any prosecutorial authority for these defendants by emphasizing that they are obligated to assist the state prosecutors. The conclusion therefrom that they are hence still entitled to full immunity squarely conflicts with the refusal in Snell v. Tunnell (10th Cir. 1990) 920 F.2d 673, 686-692 to place the prosecutorial cloak on social workers who, like the County defendants herein, merely report their neglect and abuse findings to other agencies for further investigation and the initiation of proceedings. Insofar as it purports to characterize local social workers as alter egos of the state prosecutors, said conclusion by the court below stretches beyond recognition the exceptionally narrow ambit which this Court has allowed for the concept of alter ego in immunity analysis. Harlow v. Fitzgerald (1982) 457 U.S. 800 [insufficient showing to deem presidential aides the alter egos of the president and hence entitled to absolute immunity].

In light of the Buckley holding which excludes prosecutorial press conferences from absolute immunity, the defamatory statements which the County defendants and State defendants made about the Gensburgs to SFDSS personnel, outside the ambit of the license action, are

patently not cloaked with absolute immunity.

B. The Questions Herein Presented Touch Squarely on Conflicts Between Decisions of the Circuit Courts of Appeal

In the wake of Butz, substantial conflicts arose among federal district court decisions on the scope of absolute immunity to be accorded social workers in connection with their investigation and court involvement with child abuse and child molest matters. At one end of the spectrum were decisions which continued to limit social workers in all respects to qualified immunity, Doe v. County of Suffolk (E.D.N.Y. 1980) 494 F.Supp. 179, Reynolds by Reynolds v. Strunk (S.D.N.Y. 1988) 688 F.Supp. 950, Czikalla v. Malloy (D.Colo. 1986) 649 F.Supp. 1212, and at the other end were decisions which accorded absolute immunity to social workers at any stage of their involvement in such matters, Whelehan v. County of Monroe (W.D.N.Y. 1983) 558 F.Supp. 1093, Hennessey v. State of Wash., Dept. of Social (E.D.Wash. 1985) 627 F.Supp. 137, Mazor v. Shelton 637 F.Supp. 330 (N.D. Cal. 1986). Strong emotions underlying important competing policy considerations, such as family integrity and protection of children, may have contributed to the strong disagreements expressed in such decisions as the foregoing.

Largely through federal circuit court decisions, a middle ground gradually emerged in which social workers are accorded absolute immunity for their actions directly connected to the commencement and pursuit of dependency actions and similar court proceedings, while leaving them with qualified immunity for investigation, child removal and other steps when taken outside of judicial supervision. Meyers v. Contra Costa County Dept. of Soc. Serv. (9th Cir. 1987) 812 F.2d 1154, Caldwell v. Lefavor (9 Cir.

1991) 928 F.2d 331, Hodorowski v. Ray (5th Cir. 1988) 844 F.2d 1210, Salyer v. Patrick (6th Cir. 1989) 874 F.2d 374, Vosburg v. Department of Social Services (4th Cir. 1989) 884 F.2d 133, Snell v. Tunnel (10th Cir. 1990), supra.

However, there remain points of disagreement between the federal circuit court decisions, some of which directly touch questions presented in this petition. Specifically:

(1) There is a conflict over whether the filing of a child removal petition or affidavit by a social worker in itself constitutes sufficient involvement in, and supervision by, the judicial process to justify absolute immunity for the ensuing removal. Compare: Austin v. Borel (5th Cir. 1987) 830 F.2d 1356 [verified removal complaint insufficient], and Millspaugh v. County Dept. of Public Welfare (7th Cir. 1991) 937 F.2d 1172 [same], with Coverdell v. Dept. of Social & Health Services (9th Cir. 1987) 834 F.2d 758 [social worker's affidavit given prosecuting attorney to present to court for removal order deemed sufficient]. Issuance of the license suspension order herein, and the accompanying removal of all foster children from the Gensburg home, entails the same competing policies and broadly the same inquiry into sufficiency of judicial involvement as the foregoing conflict.

(2) There is a conflict over whether a social worker, in rendering assistance to a prosecuting attorney, is sufficiently involved in the prosecutorial process to be entitled to absolute immunity. Compare: Snell v. Tunnell (10th Cir. 1990), supra [insufficient that social worker merely provides investigative findings to prosecuting attorney], with Frazier v. Bailey (1st Cir. 1992) 957 F.2d 920, 931, n.12 [public social workers, and possibly private social workers under contract with government, entitled to

absolute immunity for assisting prosecution]. See: Hennessey v. State of Wash. Dept. of Social (E.D. Wash. 1985), supra [sufficient that social worker recommends to prosecuting attorney that the latter should file dependency petition]. This conflict squarely touches the issue herein as to whether the transmission of reports and findings by the County defendants to state prosecutors is, as concluded by the court below, are sufficient to accord absolute immunity to the County defendants notwithstanding their lack of prosecutorial authority.

C. The Questions Herein Presented are Important

In rendering its decision, the court below carries yet a further step the tangential departure of the California courts from the mainstream of decisional law on immunities allowable in federal civil rights litigation.

The premise upon which the court below launched its analysis of how prosecutorial immunity applies to social workers, namely that "most federal courts" extend such immunity to "social workers performing their statutorily-authorized functions", is actually supported only by its federal citations to two early district court decisions, Whelehan v. County of Monroe (W.D.N.Y. 1983), supra, and Mazor v. Shelton (N.D.Cal.1986), supra, which did essentially blanket social workers with prosecutorial immunity, but which have since fallen by the wayside as the federal circuit courts developed the mainstream approach described in the preceding section.

Its premise is also supported by its ensuing citations to California court decisions, Alicia T. v. County of Los Angeles (1990) 222 Cal.App.3d 869, McMartin v. Children's Institute Intern. (1989) 212 Cal.App.3d 1393, and Jenkins v. County of Orange (1989) 212 Cal.App.3d 278, all

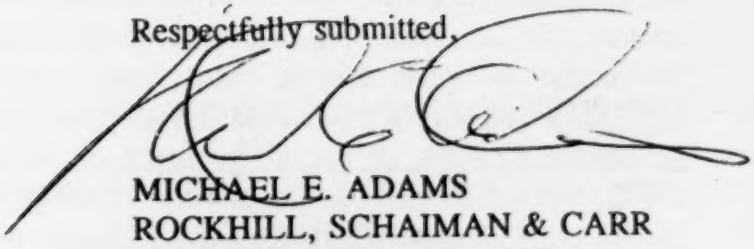
of which are irreconcilible with the decisions of this Court and the prevailing tenor of federal circuit court decisions. Jenkins relies on some of the above-discussed early district court decisions (Mazor, Whelehan, and Hennessey) in taking issue with Hodorowski v. Ray (5th Cir. 1988), supra, and holding expressly that, in removing a child from home, a social worker automatically has absolute immunity, regardless of whether a court order is even sought. Alicia T. misreads an array of federal decisions as evenly divided, and concludes therefrom that it is free to steer its own policy course, this conclusion leading again to absolute immunity for social workers dealing with child abuse matters. McMartin extends the questionable alter ego concept used in Coverdale v. Dept. of Social & Health Services (9th Cir. 1987), supra, to blanket the private investigative firm in McMartin with absolute immunity. Dubious when issued, the McMartin opinion simply cannot now be squared with the probable cause bright line established in Buckley as the limiting point for absolutely immunizing prosecutorial investigative activity.

The time is ripe for correcting the course of federal immunity decisions by California courts. The policy issues are important. The lower federal courts can also benefit from further guidance in charting their path down the road of absolute immunity for administrative officials which Butz opened 17 years ago.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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[Second Amended Complaint: caption, preliminary allegations, and prayer are omitted]

FIRST CAUSE OF ACTION
(Federal civil rights under 42 U.S.C. 1983; as to County defendants)

FCR-1 At all times herein involved, plaintiffs Matthew Gensburg and Pamela Gensburg ("Gensburgs") were and are husband and wife, and did and do reside at 6 East Bellevue, San Mateo, CA, together with Stuart Gensburg, their minor son, Brandi Kolstad, a minor for whom the Gensburgs are legal guardians, and other minors for whom plaintiffs Matthew Gensburg and Pamela Gensburg served as licensed foster parents.

FCR-2 Plaintiff Nancy Curry is the natural mother of Gregory Evans and Charmaine Evans, minors, who, at certain relevant times herein, resided as foster children with plaintiffs Matthew Gensburg and Pamela Gensburg.

FCR-3 At all times herein involved, defendants Stuart R. Oppenheim, Pat Crawford, Marjorie Knoop, and defendants

Does 1 to 10 (hereinafter "County defendants"), were employees of the State Department of Social Services and/or San Mateo County Department of Social Services ("San Mateo DSS"), and maintained their offices and acted as hereinbelow alleged within, and under the auspices of, defendant County of San Mateo. Commencing in or about 1988, defendant Stuart R. Oppenheim was the deputy program director for San Mateo DSS, and his duties included establishing policies and practices followed by San Mateo DSS in making placements of foster children. Defendant Pat Crawford headed the licensing unit which State DSS maintained at San Mateo DSS for supervision of licensed foster parents in San Mateo County, and defendant Marjorie Knoop was the official in said licensing unit who supervised the Gensburgs' foster care license. The duties of defendants Crawford and Knoop included the investigation of complaints against licensed foster parents, and the forwarding of investigation reports to State DSS officials in Sacramento, CA ("State DSS") for the latter to determine, on the basis of

such investigation reports, whether to initiate and conduct formal administrative adjudicatory proceedings to revoke, suspend, or impose probation upon the involved foster care licenses ("adjudicatory license proceedings"), and whether, pursuant to the provisions of Health and Safety Code Section 1550(e), administratively to suspend the involved foster care licenses prior to hearing in the adjudicatory license proceedings ("temporary license suspension").

FCR-4 The County defendants are sued herein in their individual capacities, and, insofar as not employees of the State of California, in their official capacities.

FCR-5 In acting as hereinbelow alleged, the County defendants acted under color of state law, and pursuant to, and in implementation of, the policies, customs, and practices of defendant County of San Mateo, including but not limited to the policy, custom, and practice of subjecting foster parents who accepted racially and ethnically mixed foster home placements to harsh, critical, and punitive treatment. This policy, custom, and practice arose from,

and was part of, a policy, custom, and practice which defendant County of San Mateo developed in 1988 or thereabouts of giving preference to the placement of minority foster children with foster parents of the same minority racial or ethnic background.

FCR-6 In 1979, the Gensburgs became licensed as foster parents in San Mateo County, and, caring for up to six foster children at a time, have since provided excellent care for hundreds of foster children.

FCR-7 Commencing in or about 1988 and continuing up to the present, the County defendants have maliciously pursued a vendetta against the Gensburgs for the purpose of driving the latter out of the foster care business. This vendetta was spawned by an exceptional willingness of the Gensburgs to accept placements of foster children from varied racial and ethnic backgrounds, and the consequent racial and ethnic mix usuallly found among foster children placed with the Gensburgs. Due to the arising of their above-alleged policies, customs, and practices in or about 1988, the County

defendants began viewing with a jaundiced eye the racial and ethnic mix of foster children placed with the Gensburgs, and began unreasonably to criticize the Gensburgs for both inconsequential and nonexistent instances of friction with their foster children from minority backgrounds, and to defame the Gensburgs by spreading unfounded rumors that they were bigots. This vendetta was further fueled by a motive of the County DSS defendants to retaliate against the Gensburgs for the increasingly vocal and ascerbic criticisms which Matthew Gensburg directed at the County DSS defendants, including during a general meeting for foster parents which defendant Stuart Oppenheim chaired in 1989.

FCR-8 Pursuant to said vendetta, the County defendants stopped placing foster children with the Gensburgs in late 1989. Despite defamatory reports from the County DSS defendants that the Gensburgs were bigoted toward their foster children and otherwise unsuited to provide foster care, the San Francisco Department of Social Services ("San Francisco DSS") then commenced in December, 1989 to

place foster children with the Gensburgs.

FCR-9 In April, 1990, Matthew Gensburg was involved in a minor physical altercation at a construction site, several miles distant from the Gensburgs' foster home, where he was working as a contractor. Although this altercation was wholly unconnected to the foster care provided by the Gensburgs, the County defendants pursued their said vendetta by forwarding their investigation report thereon to State DSS, and urging the latter to seek revocation of the Gensburgs' foster care license by charging that

said altercation constituted conduct inimical to the Gensburgs' foster children within the meaning of Health and Safety Code Section 1550(c). In thus urging prosecution of the Gensburgs, the County defendants then and thereafter made defamatory statements to State DSS which falsely characterized the Gensburgs as bigoted and violent toward their foster children, and as otherwise unfit to be foster parents. The County defendants thereby induced and caused State DSS to commence adjudicatory license proceedings

against the Gensburgs by issuing, on June 6, 1991, an Accusation alleging said charge.

FCR-10 Between June and September, 1991, the County defendants pursued said vendetta by conducting, contrary to established rules and policies requiring that licensees be investigated impartially and only in response to complaints received about licensees, a malicious exploratory investigation into the Gensburgs' foster care activities. In this investigation, the County defendants sought out persons having any contact with the Gensburgs, and maliciously induced such persons to manufacture statements against the Gensburgs, including by making to such persons defamatory statements that the Gensburgs were bigoted and physically violent around their foster children, and encouraging such persons to respond by making similar statements. The County defendants thereby obtained and provided to State DSS negative statements about the Gensburgs, some of which the County DSS defendants knew or were substantially certain were false, misleading, and materially inaccurate, and

the balance of which the County DSS defendants thus obtained and provided with a reckless disregard of the falsity and inaccuracy thereof. During said time period, the County defendants furthermore sought to add impetus to the license revocation effort by making further defamatory statements to State DSS such as alleged hereinabove. The County defendants thereby induced and caused State DSS to make two successive amendments, respectively on September 17 and 25, 1991, to the Accusation against the Gensburgs in which thirty further charges were added which alleged that the Gensburgs had engaged in various actions which were dangerous or otherwise harmful to the rights and interests of their foster children. The County defendants thereby also induced and caused State DSS to impose, on September 17, 1991, a temporary license suspension on the Gensburgs which remained in effect until mid-February, 1992.

FCR-11 The County defendants acted as alleged in Paragraphs FCR-9 and FCR-10 in nonprosecutorial administrative and investigative roles because none of the

County defendants possessed any power or authority to initiate or conduct adjudicatory license proceedings or to impose any administrative pre-hearing license suspension, and furthermore because the issuance of a temporary license suspension is in any event a nonprosecutorial administrative function.

FCR-12 In ensuing adjudicatory proceedings on said amended Accusation, an eleven day evidenciary hearing conducted during October and November, 1991, before an independent administrative law judge resulted in issuance by the latter of a lengthy proposed decision in January, 1992 which recommended dismissal of all charges against the Gensburgs. In August, 1992, State DSS revised said proposed decision to uphold several charges against the Gensburgs, and to impose probation with suspended revocation of their license. In December, 1992, the above-entitled court decided an administrative mandamus petition by reversing the latter decision and requiring full reinstatement of the Gensburg's license.

FCR-13 During and after said adjudicatory proceedings, the County defendants continued to make defamatory statements about the Gensburgs to State DSS and San Francisco DSS which characterized the Gensburgs as bigoted and violent toward their foster children, and as generally unfit to provide foster care.

FCR-14 As the cumulative result of the above-alleged conduct by defendants, San Francisco DSS was induced in August, 1992 to attempt the wholesale removal of all foster children then placed with the Gensburgs, and, failing that, to refuse to place any further foster children with the Gensburgs.

FCR-15 As a proximate result thereof, the Gensburgs incurred legal costs in defending against said adjudicatory license proceedings and the above-alleged adverse administrative actions subsequently attempted and taken by San Francisco DSS, and the Gensburgs suffered substantial economic harm, including loss of any foster care income during the five months that their license was temporarily

suspended, and dwindling and imminent total loss of foster care income due to the lack of further foster child placements by San Francisco DSS since August, 1992. The Gensburgs will suffer future loss of foster care income in that defendants' said actions have substantialy damaged the Gensburgs' business reputations as foster parents, and have thereby impaired if not destroyed the Gensburgs' prospects for obtaining foster care placements from any available source.

FCR-16 As a further proximate result thereof, the Gensburgs have suffered substantial damage to their personal reputations, as well as mental and emotional anguish, fear, humiliation, and distress. In consequence thereof, Pamela Gensburg has incurred medical expenses for aggravation of a preexisting abdominal malady, and both Gensburgs have incurred expenses for psychological treatment and counseling.

FCR-17 As a further proximate result thereof, plaintiffs Stuart Gensburg, Brandi Kolstad, Nancy Curry, Gregory

Evans, and Charmaine Evans have suffered mental and emotional anguish, fear, humiliation and distress. In consequence thereof, plaintiffs Nancy Curry, Gregory Evans, and Charmaine Evans have undergone protracted therapy for the psychological trauma caused Gregory Evans and Charmaine Evans by their aforesaid traumatic removal from the Gensburg home despite their positive adjustment thereto said home, and have suffered protracted delay in their planned reunification as a family.

FCR-18 The above-alleged actions of the County defendants violated plaintiffs' clearly established constitutional rights, including the Gensburgs' right to freely express critical comments about public officials, the Gensburgs' liberty and property interests in pursuing their chosen occupation as licensed foster parents, and the liberty interests of all plaintiffs in freedom of association and family integrity, as protected by the First, Fourth, Ninth, and Fourteenth Amendments to the United States Constitution.

FCR-19 Reasonable public officials in the positions of the

State defendants would have known that plaintiffs' said constitutional rights were violated by the conduct of said defendants in making defamatory statements injurious to the Gensburgs' business and personal reputations, and in maliciously and without objectively reasonable grounds inducing State DSS to prosecute the license revocation proceedings against the Gensburgs and temporarily to suspend the Gensburgs' foster care license.

FCR-20 The above alleged conduct of the individual County defendants, other than defendant County of San Mateo, was willful, malicious, and oppressive, thereby entitling plaintiffs to an award of punitive damages against said defendants.

SECOND CAUSE OF ACTION

(Federal civil rights under 42 U.S.C. 1983; as to State defendants)

FCR-1 Plaintiffs herein realleged Paragraphs FCR-1 through FCR-13 of the First Cause of Action, and each and every allegation thereof, as though fully set forth herein.

FCR-2 At all times herein involved, defendant Fred Miller,

was the Deputy Director of the Community Care Licensing Division of the California State Department of Social Services, defendant Steven A. Shaffer was a Staff Attorney in the Office of Chief Counsel of the State DSS, and defendants Does 11 to 20 were employees or officials of the State DSS who participated in presently unknown capacities in the actions alleged hereinbelow. Said defendants are hereinafter collectively referred to as the "State defendants".

FCR-3 After preparing the Accusation filed against the Gensburgs on June 6, 1991, defendant Shaffer departed from his prosecutorial role by joining with the County defendants in maliciously conducting an improperly aggressive investigation of the Gensburgs in the effort to produce witnesses adverse to the Gensburgs to support additional charges to allege against their license. Defendant Shaffer participated personally in this investigation, eschewing the professional investigators employed by State DSS and ordinarily utilized in its licensing investigations. For the purpose of maliciously inducing potential witnesses to make

statements adverse to the Gensburgs, defendant Shaffer sought out persons having any contact with the Gensburgs and encouraged them to manufacture negative statements about the Gensburgs, including by making to such persons defamatory statements that the Gensburgs were bigoted and physically violent around their foster children, and requesting similar statements from such persons. Defendant Shaffer did so in an overzealous and unprofessional manner, and with knowledge or substantial certainty that certain of the negative statements thereby elicited were false, inaccurate, and materially misleading, and a reckless disregard of the falsity and inaccuracy of the remainder of said negative statements. The County defendants and defendant Shaffer thereby induced several witnesses to make false statements against the Gensburgs, including statements by the Aunchmans, obviously antagonistic neighbors of the Gensburgs, that they once called the police because Matthew Gensburg had menacingly displayed a pistol, and that Gensburg had on another occasion referred to Black foster

children in his care as "f---ing nigger bitches". Defendant Shaffer displayed his malicious disregard for the truth or falsity of such statements by failing and refusing to ascertain from independent witnesses, such as the police in the case of the pistol allegation, whether or not such statements could be corroborated.

FCR-4 Acting in said nonprosecutorial investigative role, Defendant Shaffer caused the Accusation to be amended by adding thirty charges thereto on the basis of said false statements.

Defendant Shaffer caused said amendment by, inter alia, providing said false statements to defendant Fred Miller, who acted in a prosecutorial role by signing and issuing amendments to said Accusation. Likewise acting in a nonprosecutorial role, defendant Shaffer advised and encouraged the Aunchmans, whom he did not legally represent, to file a civil harrassment petition against the Gensburgs on the basis of their false and uncorroborated statements against the latter. The Aunchmans did so, and

their petition was denied on its merits by the above-entitled court on October 4, 1991.

FCR-5 On September 17, 1991, the State defendants issued and caused the issuance of an administrative order on the basis of said false statements, doing so in purported exercise of their authority under Health and Safety Code Section 1550(e). This administrative order immediately suspended the Gensburgs' foster care license until after a hearing was completed in the adjudicatory license proceedings. This order was signed by defendant Miller after he personally encouraged, approved, and ratified the above-alleged malicious investigation by the County defendants and defendant Shaffer. In issuing and causing the issuance of said administrative order, the State defendants acted in nonprosecutorial administrative roles in that, before issuance thereof, this order was not submitted to or reviewed by any court, judicial officer, or administrative law judge, and the issuance thereof did not further or advance the adjudicatory license proceedings then pending. By reason of the ordered

license suspension, all five foster children then in the care of the Gensburgs, including plaintiffs Gregory Evans and Charmaine Evans, were peremptorily removed from the Gensburg home.

FCR-6 Plaintiffs are informed and believe that, during and after said adjudicatory license proceedings, the State defendants made defamatory statements about the Gensburgs to San Francisco DSS personnel and other unknown persons which characterized the Gensburgs as bigots and as unfit to provide foster care.

FCR-7 Plaintiffs herein reallege Paragraphs FCR-13 through FCR-16, and each and every allegation thereof, as though fully set forth herein.

FCR-8 The above-alleged actions of the State defendants violated plaintiffs' clearly established constitutional rights, including the Gensburgs' Due Process liberty and property interests in pursuing their chosen occupation as licensed foster parents, and the Due Process liberty interests of all plaintiffs in freedom of association and family integrity, as

protected by the First, Fourth, Ninth, and Fourteenth Amendments to the United States Constitution.

FCR-9 An objectively reasonable public official in the position of defendant Shaffer would have known that his actions in maliciously investigating the Gensburgs violated their said constitutional rights because said actions caused the addition to the adjudicative license proceedings of thirty further charges based on false and maliciously made statements which were unsupported by reasonable or probable cause.

FCR-10 Objectively reasonable public officials in the positions of defendants Shaffer and Miller would have known that their actions in causing issuance of the temporary suspension order against the Gensburgs' license violated said constitutional rights of the Gensburgs and their co-plaintiffs because, consistently with Due Process, Health and Safety Code Section 1550(e) permits such temporary license suspensions only in the event of reasonable belief by State DSS that an emergency exists in which continued operation

of the licensed facility would substantially threaten the health or safety of persons in care there, and no objectively reasonable basis existed to believe on the basis of the above-alleged malicious investigation that such an emergency existed.

FCR-11 The above-alleged conduct of the State defendants, and each of them, was willful, malicious, and oppressive, thereby entitling plaintiffs to an award of punitive damages against said defendants.

THIRD CAUSE OF ACTION

(Violation of federal civil rights 42 U.S.C. 1983)

FCR-1 Plaintiffs herein reallege Paragraphs FCR-1 through FCR-20 of the First Cause of Action, and Paragraphs FCR-1 through FCR-11 of the Second Cause of Action, and each and every allegation thereof, as though fully set forth herein.

FCR-2 From 1988 to present, defendants and each of them have conspired together for the purpose of conducting a malicious vendetta of defaming and maliciously prosecuting

the Gensburgs in violation of the latter's above-alleged constitutional rights.

FCR-3 Among their overt acts pursuant to said conspiracy, defendants acted as alleged in Paragraphs FCR-7, FCR-8, FCR-9, FCR-10, and FCR-13 of the First Cause of Action, and in Paragraphs FCR-3, FCR-4, FCR-5, and FCR-6 of the Second Cause of Action.

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Attorneys for Plaintiffs

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN MATEO

MATTHEW GENSBURG and PAMELA GENSBURG, both individually and as guardians ad litem for STUART GENSBURG and BRANDI KOLSTAD; NANCY CURRY, both individually and as guardian ad litem for GREGORY EVANS and CHARMAINE EVANS,

Plaintiffs,

v.

FRED MILLER, STEVEN A. SHAFFER, STUART R. OPPENHEIM, PAT CRAWFORD, MARJORIE KNOOP, COUNTY OF SAN MATEO, and DOES 1 to 20,

Defendants.
_____/

NO. 377576

JUDGMENT FOR DEFENDANTS AFTER ORDERS GRANTING DEMURRERS TO SECOND AMENDED COMPLAINT

On August 11, 1993, this court heard and granted, without leave to amend, defendants' demurrers to the second amended complaint. On August 17, 1993, this court filed its written order thus granting said demurrer by defendants Fred Miller and Steven A. Shaffer, and on August 19, 1993 said defendants served by mail their Notice of Entry of Judgment. On September 8, 1993, this court filed its written order thus granting said demurrer by defendants Stuart R. Oppenheim, Pat Crawford, Marjorie Knoop, and County of San Mateo. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. That Judgment forthwith be entered in the instant matter on behalf of all above-named defendants.

2. That, as to defendants Fred Miller and Steven A. Shaffer, this judgment shall effective nunc pro tunc as of August 17, 1993, and the notice of Entry of Judgment served by said defendants on August 19, 1993 shall be effective for all purposes, including commencement of the running of

time for appeal.

DATED: October 18, 1993

_____

WALTER H. HARRINGTON, JR.
SUPERIOR COURT JUDGE

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

MATTHEW GENSBURG, et al.,	A063468
Plaintiffs and Appellants,	(San Mateo County Super. Ct. No. 377576)
vs.	
FRED MILLER, et al.,	
Defendants and Respondents.	

_____/

In this federal civil rights action against employees of the State Department of Social Services (State DSS or Department), the County of San Mateo (County) and the County Department of Social Services (County DSS) arising out of the suspension of appellants' foster home license, the trial court sustained a demurrer without leave to amend on the ground that the defendants were absolutely immune from

civil liability for their alleged misconduct. We are in agreement with the trial court and affirm.

BACKGROUND

On appeal from a judgment of dismissal after sustaining a demurrer without leave to amend, we assume the truth of all well pleaded material facts, but not of contentions, deductions or conclusions of law. It is error to sustain the demurrer if plaintiff has stated a cause of action under any legal theory, and it is an abuse of discretion to sustain a demurrer without leave if there is a reasonable possibility that the defect can be cured by amendment. (Aubry v. Tri-City Hospital Dist. (1992) 2 Cal.4th 962, 966-967). Mindful of these settled rules, we summarize the allegations of the third amended complaint.

The Parties

Plaintiffs, Matthew and Pamela Gensburg (the Gensburgs) are husband and wife who operate a foster home out of their residence in the County of San Mateo. Plaintiff Nancy Curry is the natural mother of two children who, at

certain times, resided as foster children in the Gensburgs' home.

Defendants Stuart R. Oppenheim, Pat Crawford and Marjorie Knoop (the County defendants) are all employees of County DSS. Oppenheim is deputy program director at County DSS; Crawford heads the licensing unit maintained by the State DSS for supervision of licensed foster parents; Knoop was the official in the licensing unit responsible for overseeing the Gensburgs' license.

First Cause of Action

Beginning in 1988, the County defendants began a vendetta designed to drive the Gensburgs out of their foster care business. The motivation for the vendetta was the County defendants' distaste for the Gensburgs' practice of accepting foster children from divergent racial and ethnic backgrounds and also retaliation for criticisms which Matthew Gensburg had publicly aired against them.

The vendetta started when the County defendants stopped placing foster children with the Gensburgs in 1989,

after which the Gensburgs began receiving placements from the San Francisco Department of Social Services.

In 1990, Matthew Gensburg was involved in an altercation at a construction site, "wholly unconnected" to the Gensburgs' foster care business. The County defendants wrote a report regarding the altercation and forwarded it to State DSS, urging revocation of the Gensburgs' foster care license. The report included "defamatory statements" to the effect that the Gensburgs were bigoted and violent toward their foster children. As a result, the State DSS filed an accusation seeking to revoke the Gensburgs' license.

From June to September, 1991, the County defendants violated established departmental policies by conducting a "malicious exploratory investigation" into the Gensburgs' foster care activities. This included procuring and forwarding to State DSS negative statements which defendants knew to be "false, misleading and materially inaccurate."

As a result of the County defendants' actions, in

September 1991 the Department amended the accusation to add 30 more charges and imposed a temporary license suspension on the Gensburgs which remained in effect until February 1992.

The case against the Gensburgs was the subject of an 11-day hearing before an administrative law judge, and resulted in a recommendation that all charges be dismissed. In January 1992, the State DSS revised the judge's decision to uphold several of the charges and to place the Gensburgs on probation. The State's decision was ultimately reversed in a writ of mandate action in superior court, which ordered reinstatement of the Gensburgs' license.

As a proximate result of the defendants' conduct the Gensburgs incurred legal fees and loss of income from their foster care business and injury to their reputations. Curry and her children as well as the Gensburgs' minor children suffered psychological trauma and humiliation.

Second Cause of Action

The second cause of action is directed against Fred

Miller, who is Deputy Director of the Community Care Licensing Division of State DSS and Steven A. Shaffer, Staff Attorney in the Department's Office of Chief Counsel.

After preparing the accusation against the Gensburgs in June 1991, Shaffer joined with the County defendants in their malicious "improperly aggressive investigation." Specifically, in an "overzealous and unprofessional manner" he encouraged witnesses to make negative statements which he either knew or was substantially certain were false and misleading. Shaffer then presented these statements to Miller, who amended the accusation to add 30 false charges against the Gensburgs. Shaffer also encouraged third parties to file a harassment suit against the Gensburgs.

On September 17, 1991 the State defendants caused to be issued an administrative order pursuant to Health and Safety Code section 1550, subdivision (e), suspending the foster care license of the Gensburgs until after the completion of formal administrative proceedings. The suspension resulted in the removal of five foster children

from the Gensburgs' home.

The actions of the State defendants violated the Gensburgs' constitutional rights, including their liberty and property interests in pursuing their occupation as licensed foster parents. Said defendants acted maliciously in that objectively reasonable public officials would have known that their actions violated the Gensburgs' constitutional rights and were unsupported by probable cause.

Third Cause of Action

The third cause of action alleges a conspiracy between the County defendants and the State defendants to violate the Gensburgs' civil rights under 42 U.S.C. section 1983.

APPEAL

I

State Immunity

Government Code section 821.6 (section 821.6) provides that "A public employee is not liable for injury caused by his [or her] instituting or prosecuting any judicial

or administrative proceeding within the scope of his [or her] employment, even if he [or she] acts maliciously and without probable cause."

In Jenkins v. County of Orange (1989) 212 Cal.App.3d 278 (Jenkins), the court found that this section confers absolute immunity on a social worker from all state-based causes of action arising out her actions in investigating child abuse allegations, initiating dependency proceedings and removing a child from his custodial parent. Likening the social worker's role to that of a prosecutor, the court held that the defendant's conduct fell within the ambit of the statute. (Id., at pp. 283-284.)

There appears little doubt that the action of the State and County defendants here were protected by the immunity set forth in section 821.6. Although the conduct here concerned actions taken in the investigation and prosecution of license suspension and revocation proceedings against foster parents rather than dependency proceedings, both types of conduct fulfill the same compelling statutory

purpose -- the preservation of the welfare and safety of dependent minor children. (See Health & Saf. Code, § 1521.6, subd. (a).)

Thus, any state or common law causes of action are barred by section 821.6.

II

Immunity under Section 1983

The complaint however is framed strictly as an action under section 1983 of the Civil Rights Act. (42 U.S.C. § 1983, [section 1983].[1] Because section 1983 was intended by Congress as a remedy to prevent unconstitutional acts by state and local officials, we must look to federal law to determine the scope of immunity of governmental officials from a section 1983 suit. (Alicia T. v. County of Los Angeles (1990) 222 Cal.App.3d 869, 878; accord Elene H.

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[1] This section provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

v. County of Los Angeles (1990) 220 Cal.App.3d 1445, 1452.)

In Imbler v. Pachtman (1976) 424 U.S. 409 (Imbler), the United States Supreme Court, following a tradition of common law precedent, held that prosecutors enjoy absolute immunity from section 1983 suits for their activities in initiating and presenting the state's case, as well as for conduct "intimately associated with the judicial phase of the criminal process . . ." (Id., at pp. 427-430.)

Subsequently in Burns v. Reed (1991) 500 U.S. 478, 492-493 (Burns) the high Court was confronted with a section 1983 suit alleging that a prosecutor had procured false testimony at a probably cause hearing to obtain a search warrant and had also given erroneous legal advice to the police. The high court held that the prosecutor was absolutely immune from liability for the former activity but

enjoyed only qualified immunity[2] for the latter, since the giving of advice to the police was not closely connected to the judicial phase of the criminal process.

The contours of prosecutorial immunity were more finely delineated in Buckley v. Fitzsimmons, (1993) ___ U.S. ___, 125 L.Ed.2d 209 (Buckley). There, prosecutors allegedly frustrated by their inability to obtain an indictment, manufactured false evidence inculpating the defendant and held a press conference at which they slandered him. In a 5-4, decision the high court recalled the "functional approach" government official immunity articulated in Burns "which looks to 'the nature of the function performed, not the identity of the actor who performed it.' " (125 L.Ed.2d at p. 223, quoting Forrester v. White (1988) 484 U.S. 219, 229.) While reiterating that prosecutorial immunity extends

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[2] Unlike absolute immunity, which shields the defendant no matter how egregious or intentional the conduct, qualified immunity shields only that conduct of a governmental official which he or she reasonably believed to be lawful in light of the clearly established law and facts of the case. (F.E. Trotter, Inc. v. Watkins (9th Cir. 1989) 869 F.2d 1312, 1315.)

to acts preparatory to the commencement of a prosecution, even outside the courtroom (125 L.Ed.2d at p. 226), the Court held that by working "hand in hand" with sheriff's detectives to fabricate inculpatory evidence, the prosecutors acted not as advocates but as investigators, functionally no different than that of the sheriff or police department. (Id., at p. 227.) Thus, the conduct was entitled to only qualified immunity.

III

Prosecutorial Immunity Applied to Social Workers

Imbler-type immunity has been extended by most federal courts to social workers performing their statutorily-authorized functions. In Meyers v. Contra Costa County Dept. of Soc. Serv. (9th Cir. 1987) 812 F.2d 1154, certiorari denied 484 U.S. 829 (Meyers), the Ninth Circuit, following a line of earlier federal court decisions (e.g. Kurzawa v. Mueller (6th Cir. 1984) 732 F.2d 1456, 1458; Mazor v. Shelton (N.D.Cal. 1986) 637 F.Supp. 330; Whelenhan v. County of Monroe (W.D. N.Y. 1983) 558

F.Supp. 1093), held that social workers were entitled to absolute immunity when performing "quasi-prosecutorial functions connected with the initiation and pursuit of child dependency proceedings." (81 F.2d at p. 1157). Drawing a parallel between the social worker's role and that of a prosecutor, the court noted: "Although child services workers do not initiate criminal proceedings, their responsibility for bringing dependency proceedings, and their responsibility to exercise independent judgment in determining when to bring such proceedings, is not very different form the responsibility of a criminal prosecutor. The social worker must make a quick decision based on perhaps incomplete information as to whether to commence investigations and initiate proceedings against parents who may have abused their children. The social worker's independence, like that of a prosecutor, would be compromised were the social worker constantly in fear that a mistake could result in a time-consuming and financially devastating civil suit." (Id., at p. 1157.)

Meyers has been followed in California. In Jenkins, the court held that social workers were absolutely immune from liability for improperly investigating allegations of child abuse, misrepresenting facts to the juvenile court and refusing to consider exculpatory evidence. (212 Cal.App.3d at pp. 286-287.) In Alicia T. v. County of Los Angeles, supra, 222 Cal.App.3d 869, the court used Meyers' reasoning in dismissing a suit brought against social workers who "'without probable cause or reasonable suspicion'" removed a minor from the custody of her parents. (Id., at p. 875.) "It is necessary to protect social workers in their vital work from the harassment of civil suits and to prevent any dilution of the protection afforded minors by the dependency provisions of the Welfare and Institutions Code. Therefore, social workers must be absolutely immune from suits alleging the improper investigation of child abuse, removal of a minor from the parental home based upon suspicion of abuse and the instigation of dependency proceedings." (Id., at p. 881.)

With this background we turn to the allegations at bar.

IV

State Defendants

1. The License Suspension

The conduct of both State defendants in temporarily suspending the Gensburgs' license under Health and Safety Code section 1550[3] are entitled to absolute immunity. In implementing disciplinary action to protect the welfare of foster children under the Gensburgs' care, the State defendants were acting in a prosecutorial role.

The Gensburgs argue that the State defendants lost their protection as prosecutors because "they were not acting as advocates, but rather performing an administrative

[3] Section 1550.5, of the Health and Safety Code, authorizes the Director of the Department to temporarily suspend any license prior to a formal hearing when, in the opinion of the Director, "the action is necessary to protect residents or clients of the facility from physical or mental abuse, abandonment, or any other substantial threat to health or safety." At the time of the events in question this provision was part of section 1550, subdivision (e). (West's Ann. Health & Saf. Code (1990) § 1550 & (1994 supp.) § 1550.5.)

function ancillary to the license revocation proceedings."

The argument proves too much. To the extent Miller and Shaffer were exercising quasi-judicial functions in invoking the license suspension, their conduct was equally protected. State officials making a decision whether to invoke suspension remedies pursuant to statute are acting in a quasi-judicial capacity, and are entitled to judicial immunity from section 1983 claims. (Butz v. Economou (1978) 438 U.S. 478, 511-512.)

Nor are we convinced by the Gensburgs' contention that in temporarily suspending their license the State defendants deprived them of due process, since their acts were not subject to judicial scrutiny. The temporary suspension provisions of section 1550 have been upheld against constitutional attack. (Habrun v. Department of Social Serices (1983) 145 Cal.App.3d 318, 321-322.) Since the State defendants acted pursuant to their lawful statutory authority, they may not be subject to civil liability. (Coverdell v. Depart. of Social & Health Services (9th Cir.

1987) 83 F.2d 758, 762-764; compare Chalkboard, Inc. v. Brandt (9th Cir. 1989) 902 F.2d 1375, 1379 [social workers bypassing statutory procedure not entitled to absolute judicial or prosecutorial immunity].)

2. Miller

All of Miller's conduct falls within the purview of Imbler/Myers prosecutorial immunity. Based on the information reported to him by Shaffer and the County DSS, Miller filed an accusation against the Gensburgs and instituted suspension proceedings. Such activities are that of a prosecutor in the traditional and classical sense. Although such disciplinary proceedings are held before an administrative agency rather than a court of law, clearly they are quasi-judicial in nature and operation. State officials performing he functions of prosecutors in administrative proceedings are entitled to absolute immunity within the meaning of Imbler. (Demery v. Kupperman (9th Cir. 1984) 735 F.2d 1139, 1143, cert. den. (1985) 469 U.S. 1127.)

3. Shaffer

Although Shaffer's conduct presents a more difficult question, we reach the same conclusion. In committing the alleged tortious acts Shaffer, as staff attorney in the office of chief counsel, was acting in an investigative role, gathering the factual information for Miller to prepare his case. Prosecutorial immunity is not limited to the initiation of formal proceedings. While the Supreme Court in Buckley held that administrative and investigative functions "that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity," it also noted that "[w]e have not retreated . . . from the principle that actions undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." (125 L.Ed.2d 209, 226, emphasis added.)

Contrary to the Gensburgs' argument, the label "investigative" is not determinative of the boundaries of the

prosecutor's immunity. The prosecutor's role may include investigatory activities in preparation for the commencement of judicial or quasi-judicial proceedings. When it does, the shield of prosecutorial immunity follows. "[A]bsolute prosecutorial immunity attaches to the actions of a prosecutor if those actions were performed as part of the prosecutor's preparation of his case even if they can be characterized as investigative or administrative." (Gobel v. Maricopa County (9th Cir. 1989) 867 F.2d 1201, 1204, quoting Demery v. Kupperman, supra, 735 F.2d 1139, 1143, internal quotation marks omitted, emphasis added.)

"Preparing to initiate a prosecution may necessitate obtaining, reviewing and evaluating evidence; absolute immunity may attach when these functions are necessary so that a prosecutor may fulfill his function as an officer of the court." (Snell v. Tunnell (10th Cir. 1990) 920 F.2d 673, 693, cert. den. (1991) 499 U.S. 976.) Shaffer's conduct in interviewing witnesses and evaluating reports and complaints in preparation for filing an accusation, falls within the scope

of the prosecutorial role. "[T]o grant a prosecutor absolute immunity for the decisions to initiate and pursue a prosecution while subjecting him to liability for action taken to secure the information necessary to make those decisions 'would only foster uniformed decision making and needless actions.'" (Marx v. Gumbinner (11th Cir. 1988) 855 F.2d 783, 792 [prosecutors entitled to absolute immunity for interviewing witnesses and crime victim prior to grand jury proceedings].)[4]

Thus, the cases cited by the Gensburgs are distinguishable in that the nonprivileged conduct engaged in by the prosecutors consisted of acts not intimately connected to the initiation of judicial proceedings.

The demurrer was properly sustained as to Shaffer.

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[4] While it is true that "encouraging" neighbors of the Gensburgs to file a harassment suit against them would not fall within the scope of the immunity we describe, the demurrer was nevertheless properly sustained because such conduct, standing alone, does not amount to a constitutional deprivation sufficient to state a section 1983 cause of action.

V

County Defendants

We next address the liability of the County defendants. In deciding the question of whether their acts are cloaked with Imbler/Meyers immunity, it is important to note the official responsibilities of each defendant as alleged in the complaint. Two of them are employed by County DSS's licensing unit, whose duty it is to supervise licenses foster parents and homes (Crawford and Knoop). The other is deputy program director of County DSS (Oppenheim).

The Gensburgs contend that the County defendants cannot partake of prosecutorial immunity because they had no power to institute or prosecute license revocation proceedings. That may be literally true. But the Imbler test focuses not on the defendants' status but the function they are performing while engaged in the alleged misconduct. Here, the County defendants were operating in a role functionally equivalent to that of the prosecutors whom they served.

Foster homes are strictly regulated by the state. (Health & Saf. Code, §§ 1530.5 et seq.; Title 22 California Code of Regulations (Regs) §§ 87000, et seq) The State DSS is empowered to suspend or revoke the license of any foster home on the grounds specified in Health and Safety Code section 1550. (Regs, § 87042.) Since the State cannot oversee all foster homes, the responsibility of supervising them falls on public or private foster family agencies (Regs. §§ 88000 et seq.; § 88005, subd. (a)(1).) A foster family agency is duty-bound to monitor the activities of its licensed foster homes. Complaints regarding child abuse or any other activities affecting certification of foster homes must be investigated and written reports prepared. (Id., §§ 88050, 88051.)

The complaint alleges that the County defendants' responsibility was to oversee the Gensburgs' foster care license, including the investigation of complaints and the forwarding of investigative reports to State DSS, "for the latter to determine, on the basis of such investigation reports,

whether to initiate and conduct formal . . . proceedings to revoke, suspend, or impose probations upon the involved foster care licensees . . . ."

The same immunity which protects prosecutors and social workers investigating child abuse should apply to County defendants when performing their duties to monitor and report on the activities of foster licensees to state prosecutorial officials.

The present case is closely analogous to McMartin v. Children's Institute International (1989) 212 Cal.App.3d 1393, certiorari denied (1990) 494 U.S. 1057 (McMartin). There it was alleged that Children's Institute International (CII), an investigative service, was hired by a city and county to investigate allegations of child abuse at a preschool and report its findings. CII's report concluded that numerous acts of abuse had occurred and that plaintiffs were the probable perpetrators. Claiming they were wrongfully indicted as a result of CII's activities, plaintiffs sued under numerous theories including civil rights violations pursuant

to section 1983. (Id., at pp. 1398-1399.)

The Court of Appeal held that CII's activities were "quasi-prosecutorial functions within the scope of their authority and were required by state law" and were therefore entitled to absolute immunity from civil rights claims. (McMartin, supra, 212 Cal.App.3d 1393, 1405.)

McMartin's reasoning applies with even greater force here. County defendants were not solicited by the Department to file reports concerning the Gensburgs -- they were in fact performing the very functions granted to them by laws of this state in reporting to the prosecutorial arm of State DSS on matters affecting the State's decision on commencing disciplinary action against the Gensburgs' foster home license. Were these actions not shielded by absolute immunity, we would be jeopardizing the foster children whom the statutes seek to protect. "Should we hold a state or social worker acting within the scope of his or her employment is not absolutely immune from suits arising from the voluntary intervention to protect a child, we would

indirectly eliminate the protection afforded to children. The state's interest in preventing child abuse will be diminished due to fear of retaliatory suits." (Jenkins, supra, 212 Cal.App.3d at p. 287.)[5]

We conclude that County defendants were entitled to absolute immunity for their actions which caused State DSS to initiate proceedings against the Gensburgs' foster care license. (See Hennessey v. State of Wash. Dept. of Social (E.D.Wash. 1985) 627 F.Supp. 137 [social worker absolutely immune from civil rights liability for giving false information to prosecutor who initiated dependency proceedings].)

---

[5] It is irrelevant that some of the conduct which is the focus of this suit concerned activities occurring outside the foster home and not necessarily connected to foster care. The statutory scheme allows the Department to take action against any licensee for conduct which is detrimental to the health, morals or safety of the children under his or her care, regardless of where it occurs. (Adamson v. Department of Social Services (1988) 207 Cal.App.3d 14, 22.)

VI

County Liability and Conspiracy

The demurrer was properly sustained as to the County as well. When section 1983 liability of a municipality is predicated on privileged conduct of its employee acting within the scope of his or her employment, the municipality is protected by the same immunity. (Jenkins, supra, 212 Cal.App.3d at pp. 287-288.)

The conspiracy cause of action fails for a similar reason. A conspiracy cannot be alleged as a tort separate and apart form the wrong it is organized to achieve. Since the underlying wrongs are subject to privilege, defendants cannot be held liable for conspiracy to commit them. (McMartin, supra, 212 Cal.App.3d 1393, 1406.)

DISPOSITION

The judgment is affirmed.

Smith, J.

We concur:

_____

Kline, P. J.

_____

Phelan, J.

First Appellate District, Division Two,

No. A063468

SO44464

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

MATTHEW GENSBURG Et Al., Appellants

v.

FRED MILLER Et Al., Respondents

Appellants' petition for review DENIED.

The request for an order directing depublication of the opinion is denied.

LUCAS

Chief Justice

CALIFORNIA HEALTH & SAFETY CODE § 1550

§ 1550. Proceedings for suspension, revocation, or denial of license, or special permit; law governing; standard of proof; expeditious hearings

The department may deny an application for, or suspend or revoke, any license or special permit issued under this chapter upon any of the following grounds and in the manner provided in this chapter:

(a) Violation by the licensee or holder of a special permit of this chapter or of the rules and regulations promulgated under this chapter.

(b) Aiding, abetting, or permitting the violation of this chapter or of the rules and regulations promulgated under this chapter.

(c) Conduct which is inimical to the health, morals, welfare, or safety of either an individual in, or receiving services from, the facility or the people of the State of California.

(d) The conviction of a licensee, or other person mentioned in Section 1522, at any time during licensure, of a crime as defined in Section 1522.

(e) The licensee of any facility or the person providing direct care or supervision knowingly allows any child to have illegal drugs or alcohol.

The director may temporarily suspend any license or special permit, prior to any hearing when, in the opinion of the director, the action is necessary to protect residents or clients of the facility from physical or mental abuse, abandonment, or any other substantial threat to health or safety. The director shall notify the licensee or holder of the special permit of the temporary suspension and the effective date of the temporary suspension and at the same time shall serve the provider with an accusation. Upon receipt of a notice of defense to the accusation by the licensee or holder of the special permit, the director shall, within 15 days, set the matter for hearing, and the hearing shall be held as soon as possible but not later than 30 days after receipt of the notice.

The temporary suspension shall remain in effect until the time the hearing is completed and the director has made a final determination on the merits. However, the temporary suspension shall be deemed vacated if the director fails to make a final determination on the merits within 30 days after the original hearing has been completed.

(2)

Supreme Court, U.S.
FILED
JUN 23 1995
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No. 94-1984

In The

Supreme Court of the United States

October Term, 1994

MATTHEW GENSBURG, *et al.*,

Petitioners,

v.

FRED MILLER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The California Court Of Appeal
First Appellate District

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court below upheld the granting of demurrers to the Second Amended Complaint filed by petitioners alleging violation of their Federal Civil Rights under 42 U. S. Code § 1983 on the basis that both the State and County defendants were entitled to absolute immunity.

The question presented with respect to the County defendants (the County of San Mateo and three of its social worker employees) is:

1. Are the County defendants, when performing a statutorily mandated investigation of allegations of child abuse or neglect of foster children in petitioners' foster family home and transmitting the report of the investigation to the State Department of Social Services prosecutorial officials entitled to absolute immunity in a Federal Civil Rights case emanating from the temporary suspension of the foster family license during the pendency of the administrative law proceeding?

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No. 94-1984

In The

Supreme Court of the United States

October Term, 1994

MATTHEW GENSBURG, *et al.*,

Petitioners,

v.

FRED MILLER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal First Appellate District

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Stuart R. Oppenheim, Pat Crawford, Marjorie Knoop and County of San Mateo respectfully request that this Court deny the petition for a writ of certiorari seeking review of the California Court of Appeal, First Appellate District opinion in this case.

OPINIONS BELOW

The opinion of the California Court of Appeal, First Appellate District is reported at 31 Cal.App.4th 512, 37

Cal.Rptr. 2d 97. The opinion of the trial court is unreported.

JURISDICTION

The California Supreme Court *en banc* denied petitioners' petition for review on March 2, 1995. Petitioner has invoked jurisdiction under 28 U.S.C. § 1257 (validity of a statute as being repugnant to the Constitution or laws of the United States).

STATUTORY PROVISION INVOLVED

In their petition, the petitioners raise for the first time the issue as to whether California Health and Safety Code section 1550(e) is repugnant to the laws of the United States but do not argue this issue in their brief.

California Health and Safety Code § 1550(e) permits the temporary suspension of any license granted by the State Department of Social Services (hereinafter "State DSS") pending a hearing and final determination on the merits. [The Director of the State DSS must notify the licensee of the temporary license suspension and contemporaneously advise the licensee of the effective date of the suspension and serve the licensee with an accusation, within fifteen days of the receipt of a Notice of Defense to the accusation by the licensee set the matter for hearing before an administrative law judge and the hearing must be held as soon as possible but not later than thirty days after the receipt of the Notice of Defense.] [The full text of

all California statutes cited in this brief are set forth in Appendix A.]

The Court below recognized that the temporary license suspension provisions of Section 1550 have been upheld against constitutional attack. In *Habrun v. Department of Social Services,* (1983) 145 Cal.App.3d 318, 193 Cal.Rptr. 340, the California Court of Appeal concluded that the Director of the State Department of Social Services did not violate the due process rights of the owners of a residential care facility for the elderly by summarily suspending the facility's license and its operations pursuant to Health and Safety Code Section 1550 pending a hearing on allegations of physical abuse and negligence endangering the health and safety of their residents. The court found that due process permits the State to temporarily deprive a citizen of the enjoyment of a property right, if the State's interest is both compelling and urgent and a timely hearing is provided. The safety of foster children in this case was such a compelling interest. Moreover, the statute permits suspension only when the Director of the State Department of Social Services reasonably believes continued operation of the facility would threaten its residents.

STATEMENT OF THE CASE

A. Proceedings Below

This Federal Civil Rights action arises out of an administrative license revocation proceeding commenced by the Director of the California State Department of

Social Services against a foster family home license granted to petitioners, Matthew and Pamela Gensburg.

The County of San Mateo Department of Social Services (hereinafter "County DSS") is a public foster family agency to whom the State DSS pursuant to Title 22 California Administrative Code (Cal. Code Regs. Tit. 22) § 88050 delegates the responsibility to investigate complaints of child abuse or neglect involving state licensed foster family homes. This provision of the California Administrative Code requires the State DSS to investigate *all* complaints of child abuse or neglect as defined by California Penal Code § 11165.2 (which defines "neglect") and § 11165.6 (which defines "child abuse").

Upon receipt of a complaint, the County DSS must notify the State licensing agency of any such complaint by telephone by the next working day following the receipt of the complaint (Cal. Code Regs. Tit. 22, § 88050(b)); make a site visit within ten calendar days after receiving the complaint (Cal. Code Regs. Tit. 22, § 88050(c)) and submit a written report to the State licensing agency relating to the findings of the investigation within ten days after the investigation has been completed (Cal. Code Regs. tit. 22, Code § 88050(f)). The report of the investigation by the County DSS must contain certain specific items (list of the complaint allegations, identity of persons who conducted investigation, persons contacted at licensed foster family home, summary of investigation and rationale for the action taken). (Cal. Code Regs. Tit. 22, § 88050(f)(1)).

Upon completion of the investigation the County DSS must make a determination as whether the alleged

incidents did occur specifying either that the alleged incidents were as a result of the investigation either found to be "substantiated", "inconclusive", or "unfounded". (Cal. Code Regs. Tit. 22, § 88050(f)(2)). The State DSS as the licensing agency has the authority to conduct a separate investigation of the licensee. (Cal. Code Regs. Tit. 22, § 88050(j)).

In the underlying case, the County DSS investigation was conducted pursuant to the California Administrative Code and the report submitted as required to the State DSS. On September 17, 1991 the State DSS issued an accusation and an eleven day evidentiary hearing was conducted pursuant to the provisions of California Government Code § 11500 et seq. during October and November 1991. An administrative law judge issued a proposed decision in January 1992 recommending dismissal of all charges. The petitioners' license which had been temporarily suspended when the accusation was filed September 17, 1991 was reinstated in February 1992 pending a final decision by the State DSS. (The suspension of the license was vacated pursuant to the provisions of Health and Safety Code section 1550(e) since the Director of the State DSS failed to make a final determination on the merits within 30 days after the administrative law judge submitted his proposed decision).

In August 1992 the State DSS pursuant to California Government Code § 11521 revised the proposed decision and imposed certain conditions of probation upon the petitioners.

In December 1992 the petitioners' petition for writ of mandate was granted by the trial court which reversed

the State DSS decision and fully reinstated the petitioners' license, eliminating the conditions of probation. This action then followed.

B. Decision Below

Both the County and State defendants demurred to petitioners' complaint and eventually the court below sustained the demurrers to the second amended complaint without leave to amend on the basis that both the State and County defendants were entitled to absolute immunity.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The decision of the Court of Appeal is consistent with and there is no conflict in the Federal Circuit Courts of Appeal extending absolute liability to county social workers performing statutorily mandated duties.

The decision of the court below is *consistent* with prior decisions in federal cases which have afforded absolute immunity to social workers performing statutorily mandated duties and the decision does not raise any new or novel questions of law.

The complaint was framed strictly as an action under Section 1983 of the Federal Civil Rights Act. Since the Federal Civil Rights Act was intended by Congress as a remedy to prevent unconstitutional acts by state and local officials, the scope of immunity of governmental officials is controlled by federal law.

The absolute immunity which was initially applied to activities of prosecutors has been extended by most federal courts to social workers performing statutorily authorized functions concerning child welfare issues. *Meyers v. Contra Costa County Department of Social Services* (9th Cir. 1987) 812 F.2d 1154, *cert. den.*, 484 U.S. 829 (social workers performing quasi-prosecutorial functions in connection with the initiation and pursuit of child dependency proceedings).[1]

Petitioner herein argues that the county defendants cannot partake of the prosecutor's absolute immunity because they do not have the authority to initiate or prosecute license revocation proceedings. The court below properly recognized the existing federal law, which focuses not on the government official's job title or status but on the function they were performing while engaged in the alleged misconduct.

This Court has repeatedly endorsed a "functional approach" in deciding whether particular actions of government employees are subject to absolute immunity. *Forrester v. White* (1988) 484 U.S. 219, 224, 108 S.Ct. 538, 98 L.Ed.2d 555; *Burns v. Reed* (1991) 500 U.S. 478, 111 S.Ct.

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[1] There are a series of decisions throughout the Circuit Courts of Appeal holding social workers and like officials are entitled to absolute immunity in child custody cases on account of testimony and other steps taken to present a custody case for court decision. *Frazier v. Bailey* (1st Cir. 1992) 957 F.2d 920; *Vosburg v. Department of Social Services* (4th Cir. 1989) 884 F.2d 133; *Stem v. Ahearn* (5th Cir. 1990) 908 F.2d 1; *Kurazwa v. Mueller* (6th Cir. 1984) 732 F.2d 1456; *Millspaugh v. County Department of Public Welfare* (7th Cir. 1991) 937 F.2d 1172; *Coverdell v. Department of Social and Health Services* (9th Cir. 1987) 834 F.2d 758.

1934, 114 L.Ed.2d 547; *Buckley v. Fitzsimmons* (1993) 509 U.S. ___, 113 S.Ct. 2606, 125 L.Ed.2d 209. As the court properly recognized below, under the functional approach, the relevant inquiry is not the *position* of the government employee but instead "immunity is justified and defined by the *function* it protects and serves, not the person to whom it attaches." *Forrester, supra,* 484 U.S. at 227 (emphasis in original).

Under the functional approach, there are two critical factors in determining whether the defense of absolute immunity is available. First, was the immunity recognized at the time the Federal Civil Rights Act, 42 U.S.C. § 1983 was enacted? Second, is it appropriate to extend absolute immunity in order to protect that individual's ability to perform his or her function?

On the first prong of the analysis, the leading case following the "functional comparability" test set forth by this court in *Butz v. Economu* (1978) 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895, is *Whelehan v. Monroe County* (W.D.N.Y. 1983) 558 F.Supp. 1093, which held that the role of social workers in reporting suspected child abuse was analogous to the role of the prosecutor and warranted the extension of absolute immunity to social workers. The court's rationale is instructive:

> If social service workers were required to guard against possible section 1983 claims arising from such decisions, their evaluation of the information at hand could be easily colored and, it may be expected, sometimes at the expense of the life or well-being of abused or neglected children. Such a result cannot be countenanced for the administration of remedial child-protective laws

> any more than prosecutors' enforcement of criminal laws. (At p. 1099.)

Under the second prong of the analysis, the court must examine the functions with which a particular official or class of officials has been lawfully entrusted and evaluate the effect that the exposure to a particular form of liability would likely have on appropriate exercise of those functions. As noted in *Vosburg v. Department of Social Services, supra*:

> Like a prosecutor, a social worker must exercise her best judgment and discretion in deciding when to file a removal petition. The welfare of the state's children would be jeopardized if social workers had to weigh their decision in terms of their potential personal liability. In short, the denial of absolute immunity here has the potential to adversely affect the efficient functioning of the state's child welfare system. Additionally, the chances are high that suits against social workers would occur with some degree of regularity. Parents resentful of and humiliated by an attempt to usurp their rights would likely channel their frustrations "into the ascription of improper and malicious actions against the state's advocate." (884 F.2d at 137.)

2. There are no conflicts between decisions of the Circuit Courts of Appeal on the issue of absolute immunity applied to social workers.

The cases cited by Petitioners, which have declined to grant absolute immunity to social workers investigating child abuse allegations, are clearly distinguishable. *Snell v. Tunnell* (10th Cir. 1990) 920 F.2d 673, involves a

very fact specific analysis of the Oklahoma procedure in which the social worker's preparation of an application for an order for conditional protective custody was pre-adjudicatory and seeks information which could be developed in other pre-adjudicatory procedures in advance of a formal petition and court hearing. Similarly, *Austin v. Borel* (5th Cir. 1987) 830 F.2d 1356, is also distinguishable. There, the mere filing of a verified complaint by the social worker without any intervention of the state prosecutor resulted in the immediate removal of the child. In *Spielman v. Hildebrand* (10th Cir. 1989) 873 F.2d 1377, the unilateral decision by the social worker to remove the child from the home before judicial process intervened was not accorded absolute immunity.

The court below acknowledged that foster family homes are strictly regulated by the State DSS, which has established regulations for the inspection and licensing of foster family homes. Since the State DSS cannot oversee all foster family homes, the responsibility for supervising foster family homes is delegated to public foster family agencies such as Respondent San Mateo County Department of Social Services (Cal. Code Regs. Tit. 22, § 88000 et seq.). The public foster family agency is required by statute to monitor the activities of licensed foster family homes and complaints regarding negligent treatment or maltreatment of children (Penal Code § 11165.2) or child abuse (Penal Code § 11165.6) must be investigated and written reports, in a format specified by the California Administrative Code (Cal. Code Regs. Tit. 22, § 88050(f)) submitted to the State DSS. As alleged in the complaint below, these investigative reports were used by the State DSS to determine whether to initiate and conduct formal

proceedings to revoke, suspend or impose restrictions on a foster family license.

Completing such a statutorily mandated investigation and transmitting it to the state licensing agency for further action is almost identical to the social worker completing an affidavit used by the prosecutor in obtaining a court order for immediate apprehension and custody of a child in *Coverdell v. Department of Social and Health Services* (9th Cir. 1987) 834 F.2d 758, 764. To the same effect is *Kurzawa v. Miller* (6th Cir. 1984) 732 F.2d 1456 (social workers involved in filing a petition to remove child from custody of parents, which petition was then pursued by state prosecutor, was accorded absolute immunity) and *Vosburg v. Department of Social Services, supra* (social worker filing a juvenile abuse petition which resulted in temporary custody order entitled to absolute immunity). *Accord, Salyer v. Parsons* (4th Cir. 1989) 874 F.2d 374, 378 (social workers who investigated and filed a child neglect petition accorded absolute immunity).

CONCLUSION

It is respectfully submitted that the performance of the statutorily mandated duties of the county social worker defendants in monitoring, investigating and reporting on the activities of the petitioner foster family licensee to the State Department of Social Service is a function which is shielded by absolute immunity. It is the responsibility of social workers to protect the health and welfare of children assigned to foster homes and they must be able to perform these duties unhampered by the

threat of civil lawsuits. The petition for writ of certiori should be denied.

Dated: June 23, 1995.

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APPENDIX A

Full text of California statutes cited in reply brief.

California Health & Safety Code

§ 1550. – **Grounds For Suspension or Revocation of License, Registration, or Special Permits; Provision for Temporary Suspension.**

The Department may deny an application for, or suspend or revoke, any license issued under this chapter upon any of the following grounds and in the manner provided in this chapter:

(a) Violation by the licensee or holder of a special permit of this chapter or of the rules and regulations promulgated under this chapter.

(b) Aiding, abetting or permitting the violation of this chapter or the rules and regulations promulgated under this chapter.

(c) Conduct which is inimical to the health, morals, welfare or safety of either an individual in or receiving services from the facility or the people of the State of California.

(d) The conviction of a licensee or other person mentioned in Section 1522, at any time during licensure, of a crime as defined in Section 1522.

(e) The licensee of any facility or the person providing direct care or supervision knowingly allows any child to have illegal drugs or alcohol.

The Director may temporarily suspend any license or special permit, prior to any hearing when, in the opinion

of the Director, the action is necessary to protect residents or clients of the facility from physical or mental abuse, abandonment or any other substantial threat to health or safety. The Director shall notify the licensee or holder of the special permit of the temporary suspension and the effective date of the temporary suspension and at the same time shall serve the provider with an accusation. Upon receipt of a notice of defense to the accusation by the licensee or holder of the special permit, the Director shall, within fifteen days, set the matter for hearing and the hearing shall be held as soon as possible but not later than thirty days after receipt of the notice. The temporary suspension shall remain in effect until the time of the hearing is completed and the Director has made a final determination on the merits. However, the temporary suspension shall be deemed vacated if the Director fails to make a final determination on the merits within thirty days after the original hearing has been completed.

§ 1551. **Conduct of Proceedings**

(a) Proceedings for suspension, revocation or denial of a license, registration or special permit under this chapter shall be conducted in accordance with the provisions of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the State Department shall have all powers granted by such provisions. In the event of conflict between provisions of this chapter and such provisions of the Government Code, the provisions of the Government Code shall prevail.

(b) In all proceedings conducted in accordance with this Section, the standard of proof to be applied shall be by the preponderance of the evidence.

(c) The Department shall commence and process licensure revocations under this chapter in a timely and expeditious manner. Notwithstanding a contrary provision of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, the Office of Administrative Hearings shall give priority calendar preference to licensure revocation hearings pursuant to this Chapter, particularly where the health and safety of clients are in question.

California Government Code

§ 1153. **Revocation, Suspension, Limitation or Condition of a Right, Authority, License of Privilege; Accusation; Contents; Verification**

A hearing to determine whether a right, authority, license or privilege shall be revoked, suspended, limited or conditioned shall be initiated by filing an accusation. The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules. The accusation shall be verified unless made by a public officer acting in his official capacity or

by an employee of an agency before which the proceeding is to be held. The verification may be on information and belief.

§ 11504. Grant, Issuance, or Renewal of Right, Authority, License or Privilege; Statement of Issues; Contents; Verification, Service; Discovery.

A hearing to determine whether a right, authority, license or privilege, shall be granted, issued or renewed shall be initiated by filing a statement of issues. The statement of issues shall be a written statement specifying the statutes and rules with which the respondent must show compliance by producing proof at the hearing, and in addition any particular matters which have come to the attention of the initiating party and which would authorize as denial of the agency action sought. The statement of issue shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief. The statement of issue shall be served in the same manner as an accusation; provided, that, if the hearing is held at the request of the respondent, the provisions of Section 11505 and Section 11506 shall not apply and the statement of issues, together with a notice of hearing, shall be delivered or mailed to the parties as provided in Section 11509. Unless a statement to respondent is served pursuant to Section 11505, a copy of Sections 11507.5, 11507.6 and 11507.7 and the name and address of the person to whom requests permitted by Section 11505 may be made, shall be served with the statement of issues.

§ 11506. Notice of Defense, Time, Content; Form; Right to Hearing; Mitigation Statement

(a) Within fifteen days after service upon him of the accusation the respondent may file with the agency, a notice of defense in which he may:

(1) Request a hearing.

(2) Object to the accusation upon the ground that it does not state acts or omissions upon which the agency may proceed.

(3) Object to the form of the accusation on the grounds that it is so indefinite or uncertain that he cannot identify the transaction or prepare his defense.

(4) Admit the accusation in whole or in part.

(5) Present new matter by way of defense.

(6) Object to the accusation upon the ground that, under the circumstances, compliance with the requirements of a regulation would result in a material violation of another regulation enacted by another department affecting substantive rights.

Within the time specified, respondent may file one or more notices of defense upon any or all of these grounds but all such notices shall be filed within the period unless the agency in its discretion authorizes the filing of a later notice.

(b) The respondent shall be entitled to a hearing on the merits if he files a notice of defense, and such notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Failure to file such notice shall constitute a waiver of the respondent's right

to a hearing, but the agency in its discretion may nevertheless grant a hearing. Unless objection is taken as provided in paragraph (3) of subdivision (a), all objections to the form of the accusation shall be deemed waived.

(c) The notice of defense shall be in writing signed by or on behalf of the respondent and shall state his mailing address. It need not be verified or follow any particular form.

(d) Respondent may file a statement by way of mitigation even if he does not file a notice of defense.

(e) As used in this section, "file", "files", "filed" or "filing" means "delivered or mailed" to the agency as provided in Section 11505.

§ 11507. Amended or Supplemental Accusation Before Submission Of Case

At any time before the matter is submitted for decision, the agency may file or permit the filing of an amended or supplemental accusation. All parties shall be notified thereof. If the amended or supplemental accusation presents new charges, the agency shall afford respondent a reasonable opportunity to prepare his defense thereto, but he shall not be entitled to file a further pleading unless the agency in its discretion so orders. Any new charges shall be deemed controverted, and any objections to the amended or supplemental accusation may be made orally and shall be noted in the record.

§ 11523. **Judicial Review**

Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure, subject however, to the statutes relating to the particular agency. Except as otherwise provided in this section, any such petition shall be filed within thirty days after the last day on which reconsideration can be ordered. The right to petition shall not be affected by the failure to seek reconsideration before the agency. The complete record of the proceedings, or such parts thereof as are designated by the petitioner shall be prepared by the agency and shall be delivered to petitioner, within thirty days after a request therefore by him or her, upon payment of the fee specified in Section 69950 as now or hereinafter amended before the transcript, the cost of preparation of other portions of the record and for certification thereof. Thereafter, the remaining balance of any costs or charges for the preparation of the record shall be assessed against the petitioner whenever the agency prevails on judicial review following trial of the cause. These costs or charges constitute a debt of the petitioner which shall be collectible by the agency in the same manner as in the case of an obligation under a contract, and no license shall be renewed or reinstated where the petitioner has failed to pay all of these costs or charges. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by an administrative law judge, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case. Where a petitioner, within ten days after the last day on which

reconsideration can be ordered, request the agency to prepare all or any part of the record the time within which a petition may be filed shall be extended until thirty days after its delivery to him or her. The agency may file with the court the original of any document in the record in lieu of a copy thereof. In the event that petitioner prevails in overturning the administrative decision following judicial review, the agency shall reimburse the petitioner for all costs of transcript preparation, compilation of the record and certification.

California Administrative Code, Title 22. **Licensing of Community Care Facilities**

Chapter 8.8 **Foster Family Agencies**

Article 6. Complaints

§ 88050. **Investigations of Child Abuse or Neglect Complaints.**

(a) The foster family agency shall investigate all complaints of child abuse or neglect as defined in Penal Code Sections 11165.2 and 11165.6.

(1) When possible, joint visits by foster family agency staff, placement workers, and other investigative agencies or persons shall be conducted as necessary to complete the complaint investigation.

(b) The foster family agency shall, in addition to meeting the requirements set forth in Penal Code Section 11166 et seq., notify the licensing and placement agencies by telephone by the next working day following receipt of the complaint.

(c) Upon receipt of a complaint, the foster family agency shall make a site visit to the certified family home within ten calendar days after receiving the complaint, except in the following situations:

(1) A site visit shall be conducted within 24 hours when there is reason to believe that a child(ren) is in imminent danger.

(2) A law enforcement officer is conducting a criminal investigation and requests the foster family agency to postpone the site visit within the ten-day period.

(3) The foster family agency determines the site visit would jeopardize its investigation and/or endanger the health and safety of the children.

(A) Prior licensing approval shall be obtained before postponement of any site visit as described in Section 88050(c)(2) and (3) above.

(d) The foster family agency shall not identify the complainant to the certified family home unless permission has been granted by the complainant.

(e) The investigation shall include, but not be limited to:

(1) Interviews with all known victim(s), witness(es), and suspect(s).

(A) Victim(s) and witness(es) shall be interviewed in person and away from the certified family home.

(1) If it is not possible or desirable for the interview to be conducted away from the certified family home, the foster family agency shall document why this did not occur.

(2) Obtaining copies of all related reports from other investigative agencies, if available, and any medical reports.

(f) A written report shall be submitted to the licensing agency and the placement agency relating the findings of the investigation and actions taken within ten days after the complaint investigation has been completed.

(1) The report shall include the following:

(A) List of the complaint allegation(s).

(B) Identification of the person(s) who conducted the investigation.

(C) Name(s) of other agencies or persons who were contacted and/or involved in the investigation.

(D) The person(s) contacted at the certified family home.

(E) Summary of the investigation.

(F) Rationale for the action taken.

(2) The foster family agency shall make one of the following determinations after completion of each complaint investigation:

(A) Substantiated (S) – if it has been determined that the alleged incident(s) did occur.

(B) Inconclusive (I) – if it has been determined that the alleged incident(s) may have occurred but cannot be proven.

(C) Unfounded (U) – if it has been determined that the alleged incident(s) could not or did not occur.

(g) Upon substantiation of a complaint, the foster family agency shall ensure action is taken against the certified family home, which may include removal of the child(ren), removal of another household member or decertification of the home, even though there were not sufficient grounds to warrant criminal prosecution.

(h) The foster family agency administrator shall ensure copies of all complaint investigation reports alleging child abuse or neglect are provided to the Board of Directors.

(i) The foster family agency shall maintain a copy of all investigative reports and a log of all complaints received which shall include:

(1) The name of the certified family home involved.

(2) The complaint allegation(s).

(3) The date the complaint was received.

(4) The date the complaint visit was conducted.

(5) The date the complaint was resolved.

(6) The findings after completion of the complaint investigation, including a determination of substantiated, inconclusive or unfounded.

(7) The action taken as specified in paragraph (f) above.

(j) The licensing agency has the authority to conduct a separate complaint investigation of a certified family home.

California Penal Code Section 11165.2 **"Neglect"; "Severe Neglect"; "General Neglect"**

As used in this article, "Neglect" means the negligent treatment or maltreatment of a child by a person responsible for the child's welfare under circumstances indicating harm or threatened harm to the child's health or welfare. The term includes both acts and omissions on the part of the responsible person.

(a) "Severe Neglect" means the negligent failure of a person having the care or custody of a child to protect the child from severe malnutrition or medically diagnosed non-organic failure to thrive. "Severe neglect" also means those situations of neglect where any person having the care or custody of a child willfully causes or permits the person or health of the child to be placed in a situation such that his or her person or health is endangered, as proscribed by Section 11165.3, including the intentional failure to provide adequate food, clothing, shelter, or medical care.

(b) "General Neglect" means the negligent failure of a person having the care or custody of a child to provide adequate food, clothing, shelter, medical care, or supervision where no physical injury to the child has occurred.

For purposes of this chapter, a child receiving treatment by spiritual means as provided in Section 16509.1 of the Welfare and Institutions Code or not receiving specialized medical treatment for religious reasons, shall not for that reason alone be considered a neglected child. An informed and appropriate medical decision made by parent or guardian after consultation with a physician or

physicians who have examined the minor does not constitute neglect.

§ 11165.6. **"Child Abuse"**

As used in this article, "child abuse" means a physical injury which is inflicted by other than accidental means on a child by another person. "Child abuse" also means the sexual abuse of a child or any act or omission proscribed by section 273(a) "willful cruelty or unjustifiable punishment of a child" or 273(d) "unlawful corporal punishment or injury". "Child abuse" also means the neglect of a child or abuse in out-of-home care, as defined in this article. "Child abuse" does not mean a mutual affray between minors. "Child abuse" does not include an injury caused by reasonable and necessary force used by a peace officer to quell a disturbance threatening physical injury to person or damage to property, to prevent physical injury to person or damage to property, for purposes of self-defense, to obtain possession of weapons or other dangerous objects within the control of a child, or to apprehend an escapee.

§ 11166.1. **Duty of Child Protective Agency**

When a child protective agency receives a report of abuse alleged to have occurred in facilities licensed to care for children by the State Department of Social Services, it shall, within twenty-four hours, notify the licensing office with jurisdiction over the facility. The child protective agency shall send the licensing agency a copy of its investigation and other pertinent materials.

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